Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1683

UNITED TELEGRAPH WORKERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

—and—

WESTERN UNION CORPORATION; TELE-PROCESSING INDUSTRIES, INC.; WESTERN UNION DATA SERVICES COMPANY, INC.; WESTERN UNION REALTY CORPORATION; GIFTAMERICA, INC.; THE WESTERN UNION TELEGRAPH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

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Opinions Below

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit issued on February 25, 1978 and is reported at 571 F.2d 665. The June 1, 1976 Decision of the Respondent National Labor Relations Board ("Board") is reported at 224 NLRB 274 (1976). The Decision of the Administrative Law Judge ("ALJ"), issued on January 10, 1975, is included (save for the Appendix) in the Board Decision, at 224 NLRB 279. Each of the foregoing is set forth in the Appendix ("App."). *infra.*

Jurisdiction

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on February 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The pertinent statutory provision is the following in Section 8, 29 U.S.C. §158, of the National Labor Relations Act, as amended, 29 U.S.C. §§141 *et seq.* ("Act").

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; • • •
>
> "(5) to refuse to bargain collectively with the representative of his employees • • •."

Counter-Statement of Question Presented

Whether this Court should review the holding of the Court below that there was substantial evidence to support the decision of the National Labor Relations Board that the Western Union Telegraph Company is not a "single employer" with the Western Union Corporation, Teleprocessing Industries, Inc., Western Union Data Services Company, Western Union Realty Corporation and GiftAmerica, Inc.?

Counter-Statement of the Case

This case comes before this Court on a Petition for a Writ of Certiorari filed by the United Telegraph Workers, A.F.L.-C.I.O., hereinafter ("Petitioner" or "U.T.W."), seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit upholding a decision of the National Labor Relations Board that Respondents herein do not constitute a "single employer" for collective bargaining purposes and therefore certain of the Respondents cannot be subject to Telegraph's bargaining obligations with Petitioner.

The material facts are essentially as stated in the Decision and Order of the Board and Opinion of the Court of Appeals (Petition at pp. 1a-8a and 25a-43a).

The Respondents herein are a holding company, Western Union Corporation, and five of its subsidiaries—The Western Union Telegraph Company, Western Union Data Services Company, Inc., Teleprocessing Industries, Inc., GiftAmerica, Inc., and Western Union Realty Corporation.

Petitioner, United Telegraph Workers, A.F.L.-C.I.O. has, since 1945, represented and still represents the produc-

tion, operation, maintenance and clerical employees of Respondent, The Western Union Telegraph Company (hereinafter "Telegraph"). The U.T.W. claims it also represents the employees of the holding company and four new subsidiary corporations as well as Telegraph and charged these corporations with refusal to bargain in violation of Section 8(a)(5) and 8(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 141, *et seq.*

For many years Telegraph's business primarily consisted of the transmission of information in record form. Prior to the Second World War and for a period thereafter, the telegram was the dominant element in Telegraph's business; since then new forms of information, including data transmission, private wire and Telex, have achieved a dominant position in Telegraph's business. In the 1960's it became apparent that the means of transmission in use at that time were greatly in need of modernization. To this end Telegraph began to replace its existing system with a system which utilized electronic-computer technology.

At the same time Telegraph recognized the need to expend and diversify and looked for areas where it could best utilize its equipment and expertise in the field of record communications. In considering the areas in which it could move, Telegraph necessarily had to consider the restrictions placed on it by its charter (Telegraph is a New York corporation) and the New York Transportation Corporations law, which made it impossible for Telegraph to merge or incorporate in another state. This, standing alone, would have dictated a new corporate structure if entry into the rapidly growing field of the use of computer technology to handle data processing were to be possible.

In addition, Telegraph necessarily had to consider the actions of the Government agency which regulates its affairs; namely, the Federal Communications Commission (hereinafter "FCC"). The FCC had begun in 1966 to investigate the relationship of the computer industry and its impact upon the regulated communications industry. In the so-called "Computer Inquiry" the FCC barred access of regulated companies to certain computer-generated business except with restrictions imposed by the FCC.[1] For this reason, and it is uncontroverted in the record, the formation of a non-regulated company or companies was necessary. The Board correctly recognized the business necessity for the formation of the other Respondents, the restrictions of Telegraph's charter, the New York Transportation Corporations Law, the effect of the decisions of the FCC in *Carterphone,* 13 F.C.C. 2d 420 (1968), and the "Computer Inquiry". The Court of Appeals found substantial evidence in the record to support the Board's finding.

Petitioner claimed to represent the employees of the new subsidiary and demanded that all Respondents bargain with it as a representative of their employees and this demand was refused. Petitioner, therefore, filed an unfair labor practice charge with the National Labor Relations Board, asserting that the six corporations (Telegraph and WUC and its four new subsidiaries) constituted a "single employer" for the purpose of collective bargaining and that these corporations (except Telegraph) had unlawfully refused to recognize and bargain with it in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158 (a)(1) and (5). The Board majority found that each of the six

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[1] *GTE Service Corp.* v. *FCC,* 474 F.2d 724 (2d Cir. 1973); 47 C.F.R. §64.702 (c) (1), (2), (3).

corporations is a separate and independent entity and that the several corporations do not constitute a "single employer".

It also found that, after their formation, each of the new subsidiaries entered into new, unregulated, business activities in which Telegraph was prohibited from acting and without effecting any change in the operation of Telegraph's business as theretofore conducted. Moreover, the traditional Telegraph bargaining unit remained intact within Telegraph. No Telegraph bargaining unit employee was deprived of Telegraph work or of representation by the Petitioner. Contrary to Petitioner's suggestion (Petition at pp. 4-8), Telegraph bargaining unit employees were not transferred to the new businesses (Petition at pp. 34a-35a). The production, maintenance and clerical employees of the new subsidiaries were new hires. Telegraph bargaining unit employees were not, as claimed by Petitioner (Petition at pp. 34a-35a), transferred to the new business. The Court of Appeals held that there was substantial evidence in the record to sustain each of the Board's findings, all of which were adverse to Petitioner.

On the critical tests for determining "single employer" status, e.g., common ownership, centralized control of labor relations, common management and interrelations of operations,[2] the Board concluded that only one, common ownership, was present in this case. Therefore, the Board held that Petitioner had failed to demonstrate that Respondents were a "single employer".

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[2] See *Radio and Television Broadcast Technicians Local 1264* v. *Broadcast Serv.*, 380 U.S. 255, 256 (1965) (per curiam), quoted with approval in *South Prairie Constr. Co.* v. *Local 627, IUOE*, 425 U.S. 800, 802 & p. 3 (1976).

Accordingly, the Board held that Telegraph's bargaining obligations "had no application" to WUC or the four new subsidiaries and dismissed the Complaint (Petition at p. 42a). In so doing it rejected the Recommended Order and Decision of the Administrative Law Judge.

The Court of Appeals found that the Board's findings are "amply supported by substantial evidence in the record" and has affirmed the Board's decision (Petition at p. 3a). Chief Judge Bazelon dissented, not from the Court's holding that the Board's conclusion that the several corporations do not constitute a single employer was based upon substantial record evidence (Petition at p. 16a), but what he considered to be the Board's failure to consider whether an "alter-ego" or "successorship" doctrine is relevant (Petition at pp. 11a-12a). He would have remanded the case to the Board despite the fact, as discussed by the majority of the Court, that this case was litigated throughout on the "single employer" theory (Petition pp. 6a-7a).

REASONS FOR NOT GRANTING THE WRIT

The decision of the Court of Appeals conforms to the decisions of this Court.

Petitioner's argument is essentially that the Court of Appeals did not apply the proper standard for review of the decision of the Board (Petition pp. 19-22). On the contrary, the Court of Appeals correctly followed the holding of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1950). There this Court laid down the rule that, where there is sufficient evidence on the record as a whole to support agency finding, this Court will intervene only when the Court of Appeals appears to have misapprehended or grossly misapplied the standard of

review which Congress has placed in the keeping of the Court of Appeals.

There is no warrant for Petitioner's assertions (Petition pp. 18, 20) that the Court below did not genuinely consider the record in this case or that it rubber stamped the Board's decision. Granted that the opinion of the Court below was succinct, it nevertheless clearly met Petitioner's arguments and disposed of them in a well-reasoned opinion. After all, the Court below did not need to write a lengthy opinion to dispose of a case in which the applicable law was well established.

There is no showing that the Court below either misapplied or misapprehended the standard for review of the Board order and therefore under *Universal Camera* the Petition should be denied.

Petitioner further attempts to have this Court, as it attempted to persuade the Court of Appeals to do, to substitute its judgment for that of the Board and reinstate the recommended decision of the Administrative Law Judge. However, as this Court has held, *NLRB* v. *Walton Manufacturing Company,* 369 U.S. 404 (1967), a reviewing Court may not displace the Board's choice between two fairly conflicting views even though the reviewing Court could justifiably have made a different choice had the matter been before it *de novo.* This Court also will not usurp the primary responsibility which Congress has placed on the Courts of Appeals to grant or deny enforcement of a Board order, *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

There has been no showing by Petitioner that the Court below did not properly discharge its responsibility for reviewing the Board's order. The only difference between the majority and the dissent in the Court of Appeals was the belief of the dissent that the case should be remanded

for further consideration by the Board. The dissent did recognize that there was substantial evidence to support the Board's conclusion that the elements of a "single employer" status had not been established. It is respectfully submitted that nothing in the law or the facts of this case justifies remand to the Board for further consideration.

Contrary to the Petitioner's argument (Petition pp. 17-18) it is apparent that, not only did the Court of Appeals follow the directions of this Court in *Universal Camera Corp., supra* and *Walton Manufacturing Company, supra,* but it likewise followed this Court's holding in *Local 627, International Union of Operating Engineers* v. *NLRB,* 518 F.2d 1040 (D.C. Cir. 1975), *aff'd in relevant part and remanded on other grounds sub nom. South Prarie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976).

There the Court of Appeals was called upon to consider "single employer" status under the National Labor Relations Act and it held that such status depended upon all of the circumstances of the particular case. This Court, 425 U.S. at p. 803, affirmed that holding. Such a holding, of course, limits the precedent value of any case. The holding here that there was not a "single employer" rests on the particular facts of this case, facts which are so unique, given the regulated status of Telegraph, that its application to the broad field of labor relations has to be extremely limited. It is obvious, therefore, that this case does not present an issue of general importance in the field of labor relations and it is inconceivable that it constitutes, as Petitioner contends (Petition p. 16) "a text for evasion of the Act".

Petitioner also contends that the decision below conflicts with the Court of Appeals' own holding in *South*

Prairie is also without merit. In *South Prairie,* unlike the present case, there was a common control of labor relations policies, the absence of which in this case the Court of Appeals considered critical. The Court of Appeals found there was substantial evidence in the record to support the Board's finding that there was not common control of labor relations. The evidence showed that each Respondent controlled its own labor relations and Telegraph's Vice President in charge of its labor relations held no office or directorship in any of the other corporations.

In addition, in *South Prairie* the Court of Appeals found that *South Prairie* was formed as a non-Union employer to undermine the Union there involved, an anti-Union *animus* which the Court of Appeals found to be absent in this case. That being so, the decision of the Court of Appeals in this case is consistent with its decision in *South Prairie* and, likewise, is consistent with prior decisions of other Courts of Appeals as well as this Court. It is respectfully submitted that this case presents nothing more than a request by Petitioner for this Court to review factual determinations and standards of law already determined by the Board and the Court of Appeals and for which there was substantial evidence in support thereof in the record. There is nothing in this case that merits review by this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Dated: July 19, 1978.

Respectfully submitted,

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